Semenanjung Selatan Sdn Bhd v Kharisma Wira Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22 NCvC-1098–09 OF 2012
YEOH WEE SIAM J
16 JUNE 2014

Contract — Agreement — Breach — Plaintiff appointed to secure and perform tender/contract to supply, deliver, integrate, test and commission RHIB — Defendant undertook to pay 8% of contract value if plaintiff manage to secure and perform contract successfully — Contract successfully tendered — RHIB broke during air drop test — Claim for commission under contract — Whether claim should be allowed — Whether plaintiff performed agreements fully — Whether there were breach of agreements

The defendant had appointed the plaintiff to secure and perform the tender/contract with the Ministry of Finance ('MINDEF') to supply, deliver, integrate, test and commission a set of regit hull inflatable boat ('the RHIB') for the Royal Malaysian Air Force ('RMAF'). The terms of the plaintiff's appointment were that the defendant undertook to pay 8% of the contract value of the MINDEF Contract to the plaintiff if the defendant and plaintiff manage to secure and perform the contract successfully. The defendant appointed one Hj Suhaimi ('PW1'), who was the managing director and owner of the plaintiff as the defendant's consultant for the project. With the plaintiff's agreement not to participate in the bid for the tender of the contract and PW1's lobbying and assistance, the defendant successfully tendered for and was awarded the contract at the value of RM5,400,000. Based on the contract, the RHIB and the air drop equipment were to be delivered from FCA Vancouver International Airport, Canada, direct to Markas Regimen, RMAF Bukit Jugra, Banting. However the defendant allowed one Byron Lee ('Byron'), to send the RHIB for a test in Florida before delivery to Malaysia and during the air drop test in Florida, the RHIB broke. Due to a delay of five months in delivering the second RHIB, the defendant was imposed with a late penalty of RM716,400 under the contract. The plaintiff proceeded to seek payment of the 8% commission under the contract. The plaintiff also sought payment of the consultant's fee for RM150,000. The defendant paid the plaintiff for commission under the contract and another RM100,000 for the consultant's fee. In the present claim, the plaintiff claimed for the payment of RM382,000 while the defendant counterclaimed that due to the plaintiff's failure to carry out its responsibilities, the defendant suffered losses. Hence, the defendant counterclaimed for RM1,417,400 for breach of first and second agreements and refund of RM200,000, which was the advance payment due to total failure of consideration by the plaintiff in carrying out its duties and responsibilities

under the first and second agreements. The issues that arose for the court's determination were whether the plaintiff had performed fully the first and second agreements with the defendant to entitle the plaintiff to make this claim; and whether the plaintiff had breached the first and second agreements with the defendant to entitle the defendant to make its counterclaim.

Held, allowing the claim and dismissing the counterclaim in part:

(1) There was a contract between the plaintiff and the defendant only in respect of the RHIB since the defendant's email on the same was addressed to the plaintiff. However, regarding the appointment of PW1 as the defendant's consultant, even though this issue was not raised by both parties, the defendant's email was addressed to PW1 personally, and not to the plaintiff. Therefore, the contract for PW1's consultancy services was only between PW1, in his personal capacity, and the defendant, but not between the plaintiff and the defendant. Since there was no privity of contract between the plaintiff and the defendant for PW1's provision of consultancy services to the defendant, the plaintiff had no contractual right to claim the balance of RM50,000 out of the RM150,000 payment for consultant's fee which had been promised by the defendant to PW1 (see paras 21–22).

(2) PW1 did not personally institute any action against the defendant to claim the balance of payment for consultant's fee. Thus, the court was unable to order the defendant to pay PW1 for the balance of consultant's fee allegedly due and owing to him by the defendant. The defendant's counterclaim against the plaintiff, but not PW1, for losses suffered as a result of PW1's failure to act as a consultant should not be allowed (see paras 23–24).

(3) There was evidence that the plaintiff supplied and delivered the RHIB. However, there was no evidence that the plaintiff installed, integrated, tested and commissioned the full one set of the RHIB for RMAF. Tie-down point was an afterthought. There was no documentary proof of this allegation by the defendant. Even the defendant itself had confirmed to the plaintiff that the plaintiff's scope was only to manage the RHIB and matters connected to the boat including training. The plaintiff was not responsible for the air drop test. Thus, the plaintiff should not be made responsible for the air drop test in Malaysia, or for the loss of equipment of the RHIB during the air drop test (see paras 45, 46).

(4) The court did not agree that this was an entire contract and not a divisible contract, which meant that there must be complete performance by the plaintiff as a condition precedent before the defendant was liable to pay the plaintiff. The plaintiff was able to lobby for and assist the defendant to secure and perform the contract successfully when the RHIB was delivered to RMAF Bukit Jugra. That part of the contract was performed

in its entirety. However, the training part of the contract was divisible from the contract to supply the RHIB. The plaintiff gave some training after the installation and maintenance process. The defendant did not allow the plaintiff to give training on the management of the RHIB since the plaintiff was not acceptable as a trainer to the RMAF and the defendant. Therefore, the defendant could only be made liable to the plaintiff regarding the supply of the RHIB, but not for the training (see paras 53–54).

[Bahasa Malaysia summary

Defendan telah melantik plaintif untuk mendapat dan melaksanakan tender/kontrak dengan Kementerian Kewangan ('MINDEF') bagi membekal, menghantar, mengintegrasi, menguji dan melengkapkan satu set regit hull inflatable boat ('RHIB') untuk Tentera Udara DiRaja Malaysia ('TUDM'). Terma-terma pelantikan plaintif adalah bahawa defendan mengakujanji untuk membayar 8% daripada nilai kontrak untuk Kontrak MINDEF kepada plaintif jika defendan dan plaintif berjaya mendapat dan melaksanakan kontrak itu dengan jayanya. Defendan telah melantik Hj Suhaimi ('PW1'), yang merupakan pengarah urusan dan pemilik plaintif sebagai perunding projek untuk plaintif. Dengan perjanjian plaintif tidak terlibat dalam bidaan tender kontrak itu dan PW1 yang melobi dan membantu, defendan telah berjaya menender dan diawardkan kontrak pada nilai RM5,400,000. Berdasarkan kontrak tersebut, RHIB dan 'air drop equipment' telah dihantar dari Lapangan Terbang Antarabangsa Vancouver FCA, Kanada, terus ke Markas Regimen, TUDM Bukit Jugra, Banting. Walau bagaimanapun, defendan telah membenarkan Byron Lee ('Byron'), untuk menghantar RHIB untuk ujian di Florida sebelum penghantaran ke Malaysia dan semasa ujian jatuh udara di Florida, RHIB itu pecah. Akibat kelewatan lima bulan dalam penghantaran RHIB kedua, defendan mengenakan denda lewat RM716,400 di bawah kontrak itu. Plaintif meneruskan dengan meminta bayaran komisyen 8% di bawah kontrak itu. Plaintif juga meminta bayaran untuk yuran perundingan berjumlah RM150,000. Defendan telah membayar plaintif untuk komisyen di bawah kontrak itu dan RM100,000 lagi untuk yuran perunding. Dalam tuntutan ini, plaintif menuntut untuk bayaran RM382,000 manakala defendan menuntut balas yang kena dibayar akibat kegagalan plaintif menjalankan tanggungjawabnya, yang mana defendan mengalami kerugian. Justeru, defendan menuntut balas RM1,417,400 kerana kemungkiran perjanjian-perjanjian pertama dan kedua dan bayaran balik RM200,000, yang merupakan bayaran pendahuluan yang kena dibayar untuk kegagalan balasan oleh plaintif dalam menjalankan kewajipan dan tanggungjawabnya di bawah perjanjian-perjanjian pertama dan kedua. Isu-isu yang timbul untuk ditentukan oleh mahkamah adalah sama ada plaintif telah melaksanakan sepenuhnya perjanjian-perjanjian pertama dan kedua dengan defendan untuk menjadikan plaintif berhak untuk membuat tuntutan ini; dan sama ada plaintif telah melanggar perjanjian-perjanjian pertama dan kedua

dengan defendan untuk menjadikan defendan berhak untuk membuat tuntutan balasnya.

Diputuskan, membenarkan tuntutan dan menolak sebahagian tuntutan balas:

(1) Terdapat kontrak antara plaintif dan defendan hanya berkaitan RHIB itu oleh kerana emel defendan saling berhubung telah dikemukakan kepada plaintif. Walau bagaimanapun, berkaitan pelantikan PW1 sebagai perunding defendan, meskipun isu ini tidak dibangkitkan oleh kedua-dua pihak, e-mel defendan telah dikemukakan kepada PW1 secara peribadi, dan bukan kepada plaintif. Oleh demikian, kontrak untuk perkhidmatan perundingan PW1 adalah hanya antara PW1, dalam kapasiti peribadinya, dan defendan, tetapi bukan antara plaintif dan defendan. Oleh kerana tiada priviti kontrak antara plaintif dan defendan untuk peruntukan PW1 berhubung perkhidmatan perundingan kepada defendan, plaintif tiada hak kontraktual untuk menuntut baki RM50,000 daripada bayaran RM150,000 untuk bayaran perunding yang telah dijanjikan oleh defendan kepada PW1 (lihat perenggan 21–22).

(2) PW1 tidak secara peribadi memulakan apa-apa tindakan terhadap defendan untuk menuntut baki bayaran bagi fi perunding. Oleh itu, mahkamah tidak dapat memerintahkan defendan membayar PW1 untuk baki fi perunding yang dikatakan kena dibayar dan terhutang kepadanya oleh defendan. Tuntutan balas defendan terhadap plaintif, tetapi bukan PW1, kerana kerugian yang dialami akibat daripada kegagalan PW1 untuk bertindak sebagai perunding tidak patut dibenarkan (lihat perenggan 23–24).

(3) Terdapat keterangan bahawa plaintif membekal dan menghantar RHIB. Walau bagaimanapun, tidak terdapat keterangan bahawa plaintif telah memasang, mengintegrasi, menguji dan melengkapkan satu set penuh RHIB untuk TUDM. Isu kerjasama adalah suatu yang telah difikirkan kemudian. Tiada bukti dokumentasi berkaitan dakwaan ini oleh defendan. Walaupun defendan sendiri telah mengesahkan kepada plaintif bahawa skop plaintif hanya untuk menguruskan RHIB dan perkara-perkara berkaitan dengan bot itu termasuk latihan. Plaintif tidak bertanggungjawab untuk ujian kejatuhan dari udara itu. Oleh itu, plaintif tidak patut dipertanggungjawabkan untuk ujian jatuh udara di Malaysia, atau untuk kerugian peralatan RHIB semasa ujian jatuh udara itu (lihat perenggan 45–46).

(4) Mahkamah tidak bersetuju bahawa ini adalah keseluruhan kontrak dan bukan kontrak boleh bahagi, yang bermaksud bahawa perlu ada pelaksanaan lengkap oleh plaintif sebagai syarat duluan sebelum defendan bertanggungjawab untuk membayar plaintif. Plaintif boleh melobi dan membantu defendan untuk menjamin dan melaksanakan

kontrak itu dengan jayanya apabila RHIB dihantar kepada TUDM Bukit Jugra. Sebahagian kontrak tersebut telah dilaksanakan secara keseluruhannya. Walau bagaimanapun, bahagian latihan kontrak itu dibahagikan daripada kontrak untuk membekal RHIB. Plaintif telah diberikan latihan selepas proses pemasangan dan penyelenggaraan. Defendan tidak membenarkan plaintif untuk memberikan latihan berkaitan pengurusan RHIB oleh kerana plaintif tidak diterima sebagai pelatih kepada TUDM dan defendan. Oleh demikian, defendan tidak boleh dipertanggungjawabkan kepada plaintif berkaitan bekalan RHIB, tetapi bukan untuk latihan (lihat perenggan 53–54).]

Notes

For a case on breach, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2962.

Cases referred to

Hoenig v Isaacs [1952] 2 All ER 176, CA (refd)

Zuraini bt Abu Talib (Nor Azmi bin Abu Talib with her) (Haris Azmi & Assoc) for the plaintiff.

Zulkafli bin Abd Hamid (Umira bt Mohd Noor with him) (Zulkafli, Rani & Co) for the defendant.

Yeoh Wee Siam J:

BRIEF FACTS

[1] Vide an email dated 4 November 2008 (IDB Pt B p 18), the defendant appointed the plaintiff to secure and perform the tender/contract with the Ministry of Defence ('Mindef') to supply, deliver, instal, integrate, test and commission one set of regit hull inflatable boat ('the RHIB' or 'the boat') ('the Mindef Contract') for the Royal Malaysian Air Force ('RMAF').

[2] The terms the plaintiff's appointment are that the defendant undertook to pay 8% of the contract value of the Mindef Contract to the plaintiff in the event that the defendant and the plaintiff manage to secure and perform the tender/contract (ie the Mindef Contract) successfully.

[3] Vide another email dated 4 November 2008 (IDB Pt B p 19), the defendant appointed Hj Suhaimi bin Hj Ramli ('PW1'), the managing director and owner of the plaintiff, as the defendant's consultant for the project.

[4] The defendant undertook to pay RM150,000–RM250,000 as a consultancy fee for the tender/contract in the event that the defendant and the plaintiff manage to secure and perform the tender/contract successfully (note:

both appointments vide the two emails dated 4 November 2008 have been referred to as the first agreement by the defendant).

[5] The defendant alleged that vide an email dated 2 September 2011, the plaintiff gave a letter of undertaking (referred to by the defendant as the second agreement), inter alia, to resolve all issues arising from the execution of the Mindef Contract successfully, to enable the defendant to claim payment from the government in the period fixed without any problem or additional costs to the defendant (note: the letter of undertaking is not exhibited in the common bundle of documents/IDB except for a reference to it by PW1 and A Rasid of the defendant in two emails on 2 September 2011 in IDB Pt B pp 32 and 34).

[6] The plaintiff at the material time was the sole agent of the principal, Zodiac International France ('Zodiac') in Malaysia for the supply of RHIBs. He was also the sales agent and consultant for Zodiac Canada in Malaysia.

[7] The defendant required the RHIB for the Mindef Contract. The RHIB was to be used with the Boat Aerial Delivery Separation System ('BADSS') to be dropped from the air ('air drop') to the sea for use of the activity to save members of the RMAF. The defendant would obtain the supply of the BADSS from its principal, Airlift Technologies International ('ATI').

[8] With the plaintiff's agreement not to participate in the bid for the tender for the Mindef Contract, and with PW1's lobbying and assistance, the defendant successfully tendered for and was awarded the Mindef Contract on 23 June 2009 (see letter of acceptance of Mindef in IDB Pt B pp 12–17). The total value of the contract is RM5,400,000 (IDB Pt B p 96).

[9] Based on the Mindef Contract, the RHIB and the air drop equipment were to be delivered from FCA Vancouver International Airport, Canada direct to Markas Regimen, RMAF Bukit Jugra, Banting, Selangor ('RMAF Bukit Jugra').

[10] However, the defendant allowed Byron Lee Woram ('Byron'), the ATI representative to send the RHIB for a test in Florida before delivery to Malaysia.

[11] During the air drop test in Florida, the RHIB broke. Zodiac agreed to replace the RHIB free of charge.

[12] Due to a delay of five months in delivering the second RHIB, the defendant was imposed with a late penalty of RM716,400 under the Mindef Contract.

[13] On 30 November 2009 the plaintiff sent the invoice to the defendant for payment of the 8% commission under the Mindef Contract amounting to RM432,000.

[14] On 14 December 2009 the plaintiff sent another invoice to the defendant for payment of the consultant's fee for RM150,000.

[15] The defendant paid the plaintiff RM100,000 15 Arpil 2011 for commission under the Mindef Contract, and another RM100,000 on 2 September 2011 for the consultant's fee.

THE PLAINTIFF'S CLAIM

[16] In the statement of claim, the plaintiff is claiming against the defendant for:

(a) payment of RM382,000 as on 6 September 2012;

(b) interest at 5%pa from 7 September 2012 until full settlement;

(c) costs as between solicitor and client; and

(d) costs of this action.

THE DEFENDANT'S COUNTERCLAIM

[17] In its re-amended defence, the defendant alleged that due to the plaintiff's failure to carry out its responsibilities under its contract with the defendant, the defendant suffered losses as follows:

(a) even though directed by the defendant to do so, the plaintiff failed to convince the client that it was not necessary to conduct the pre-delivery inspection ('PDI') under the Mindef Contract in Vancouver. The defendant was then forced to send four company representatives for the PDI and incurred expenses of RM150,000;

(b) even though directed by the defendant to do so, the plaintiff also failed to convince the client that it was not necessary to conduct the PDI under the Mindef Contract in Florida. The defendant was forced to send a company representative to Florida for the PDI and incurred expenses of RM50,000;

(c) the plaintiff failed to conduct training for the use of the RHIB in Malaysia. As a result, the defendant had to get a foreign expert to do the training and incurred expenses of RM54,000;

(d) the plaintiff failed to conduct the training for air drop of the RHIB in Malaysia. The defendant had to invite foreign experts to do so and incurred expenses of RM350,000;

(e) during the training session for air drop of the RHIB, certain equipment were lost resulting in the loss of RM97,000. The defendant had to replace the equipment with new ones which cost RM142,000; and

(f) the defendant was imposed with a late penalty of RM716,400 under the Mindef Contract.

[18] In para 9 of the re-amended counterclaim ('the counterclaim'), the defendant is claiming from the plaintiff:

(a) damages of RM1,417,400 for breach of the first and second agreements;

(b) refund of the RM200,000 which is 'advance payment' due to the total failure of consideration by the plaintiff in carrying out its duties and responsibilities according to the first and second agreements;

(c) other damages to be assessed by the court;

(d) interest for the judgment sum in paras (a), (b) and (c) above at 8%pa from the date of the writ of summons until full payment;

(e) costs; and

(f) further relief as deemed just and appropriate by this honourable court.

ISSUES

[19] In brief, the issues are:

(a) whether the plaintiff has performed fully the first and second agreements with the defendant to entitle the plaintiff to make this claim; and

(b) whether the plaintiff had breached the first and second agreements with the defendant to entitle the defendant to make its counterclaim.

EVALUATION AND FINDINGS

Whether there is a contract between the plaintiff and the defendant

[20] There was no formal contract executed between the plaintiff and the defendant. However, both parties do not dispute that vide the two emails dated 4 November 2008, there is a contract between the plaintiff and the defendant regarding the RHIB (IDB Pt B p 18), and between PW1 and the defendant regarding PW1's appointment as a consultant to the defendant for the project under the Mindef Contract (IDB Pt B p 19).

[21] The court finds that there is a contract between the plaintiff and defendant only in respect of the RHIB since the defendant's email on the same was addressed to the plaintiff.

[22] However, regarding the appointment of PW1 as the defendant's consultant, even though this issue was not raised by both parties, the court finds that the defendant's email was addressed to PW1 personally, and not to the plaintiff. Therefore, the contract for PW1's consultancy services was only between PW1, in his personal capacity, and the defendant, but not between the plaintiff and the defendant. Since there is no privity of contract between the plaintiff and the defendant for PW1's provision of consultancy services to the defendant, it follows that the plaintiff has no contractual right to claim the balance of RM50,000 out of the RM150,000 payment for consultant's fee which had been promised by the defendant to PW1.

[23] PW1 did not personally institute any action against the defendant to claim the balance of payment for consultant's fee. Thus, the court is unable to order the defendant to pay PW1 for the balance of consultant's fee allegedly due and owing to him by the defendant.

[24] Based on the same rationale, it also follows that the defendant's counterclaim against the plaintiff, but not PW1, for losses suffered as a result of PW1's failure to act as a consultant should not be allowed.

Whether there is a breach of the first agreement by the plaintiff regarding the RHIB

[25] The defendant contended that the plaintiff was bound by the first and second agreements. However, the defendant failed to exhibit the plaintiff's letter of undertaking dated 2 September 2011 which, according to the defendant, was the second agreement. In the absence of the second agreement and its terms being produced as an exhibit, the court proceeds on the basis that there is no second agreement. Thus, the plaintiff and the defendant are only bound by the first agreement (IDB Pt B p 18). The first agreement, with reference to the Mindef Contract, inter alia, states as follows:

> We Kharisma Wira Sdn Bhd (Company No: 246893-K) hereby undertake to pay 8% of the above contract value to Semenanjung Selatan Sdn Bhd in the event we manage to secure and perform the above Tender/Contract successfully.

[26] There is no dispute that with PW1's assistance in bidding for the tender, the defendants secured the Mindef Contract as evidenced by the letter of acceptance (IDB Pt B pp 12–17).

[27] The question then is whether the plaintiff assisted the defendant to perform the Mindef Contract successfully. From the evidence adduced, after the first test for air drop of the RHIB, using the BADSS, failed in Florida, Zodiac agreed to replace, at no extra cost, with a new RHIB. The new RHIB was finally delivered to RMAF Bukit Jugra.

[28] The heading to the first agreement in the defendant's email dated 4 November 2008 (IDB Pt B p 18) states as follows:

> REF: Membekal, Menghantar, Memasang, Mengintegrasi, Menguji dan Mentauliah Satu (1) Set Regit Hull Inflatable Boat (RHIB) Untuk Tentera Udara DiRaja Malaysia (Tender No: KP(PERO-2) C/+217/2008).

[29] There is evidence that the plaintiff supplied and delivered the RHIB. However, there is no evidence that the plaintiff installed, integrated, tested and commissioned the full one set of the RHIB for RMAF.

[30] In PW1's email dated 5 September 2011 (IDB Pt B pp 33–34), PW1 gave the proposed scope to commence work for the Mindef Contract in regard to the RHIB. At the end of his email, he stated, inter alia, that before he could begin work he requested the defendant to get the permission to enter the camp area or store to repair the trailer.

[31] Kolonel Mohamad Nazri bin Dashah ('DW2'), the *pegawai memerintah* supervising Kem Rejimen TUDM Jugra ('the camp') at the material time, testified that PW1 is banned until today from entering the camp in view of a previous defective boat that PW1 had supplied to the camp. The defendant's marketing officer, Baharudin bin Abu Bakar ('PW3') appealed to DW2 for permission for PW1 to enter the camp to carry out his responsibilities as a consultant but DW2 did not allow it.

[32] DW2 confirmed that for the contract to supply the RHIB, the defendant finally successfully executed the Mindef Contract but it was 199 days after the contract period. The defendant was imposed with a late penalty.

[33] From DW2's evidence, it can be concluded that the plaintiff did supply the RHIB even though it was 199 days late.

[34] The plaintiff further relied on the defendant's letter to the plaintiff written by PW3 on 6 May 2011 (IDB Pt B pp 28–29), for the attention of PW1, which stated:

> 5 Saya juga memberi akuan bahawa sepanjang persediaan dan perlaksanaan kontrak ini, saya bagi pihak KWSB dan Dato' amat puas hati atas perkhidmatan Tuan Haji

membantu kami dan juga kerjasama dari Syarikat Semenanjung Selatan Sdn Bhd untuk menjayakan dan menyelesaikan kontrak ini secara bersama.

6 Saya juga ingin menjelaskan bahawa dengan mengatasi peralatan tuntutan dari pihak TUDM ini, pihak kami akan membuat 'Life Drop' yang mana ia telah dipertanggung jawabkan dan diurus oleh pihak Airlift Technology Internasional (ATI) iaitu Mr. Byron Lee Woram. Segala latihan dan Final Acceptance Test (FAT) BADSS bersama RHIB ini tidak akan melibatkan kos atau liabiliti pada pihak Tuan Haji atau Semenanjung Selatan Sdn Bhd sekiranya berlaku kehilangan atau kerosakan sewaktu dan selepas 'Life Drop' dibuat.

[35] From the above letter, it is clear that PW3, who was then still the employee of the defendant and had not yet resigned from his position as per his letter of resignation dated 8 June 2011 (exh P3C in IDTP pp 3–4) (which resignation was rejected by the defendant on 8 June 2011 (see exh P3C in IDTP pp 3–4)) had held out the defendant's position that the defendant was very satisfied with PW1's service and the co-operation of the plaintiff to successfully complete the Mindef Contract together with the defendant.

[36] The issue then is whether the plaintiff had breached the first agreement with the defendant as alleged in the counterclaim.

[37] In regard to the matter regarding the PDI, the defendant alleged that the plaintiff did not heed the defendant's instructions to convince its client that there was no necessity to have the PDI in Vancouver and Florida.

[38] However, from Mindef's letter of acceptance (IDB Pt B pp 12–17), it is clear that the Mindef Contract is between the defendant and Mindef, and the plaintiff is not a party to the contract. In para 19.1 of p 17 of the same document, it is stated that there would be two PDIs:

(a) one PDI for the RHIB to be represented by three government officers; and

(b) one PDI for the BADSS to be represented by three government officers.

[39] Thus, if the was required to send its own representatives for the PDI in Vancouver and Florida, it is incumbent upon the defendant to bear its own expenses, and not to counterclaim for such expenses from the plaintiff. Furthermore, it is noted that there is no provision in the first agreement that the plaintiff was to bear any expenses for the PDI.

[40] In fact, the evidence shows that PW1 and the plaintiff were kept in the dark by the defendant when it sent the RHIB to Florida for the air drop test on the request of Byron of ATI/Florida. PW1 stated that he was shocked when he

found out about this. According to the terms of the Mindef Contract, the RHIB was to be delivered direct from Vancouver to RMAF Bukit Jugra.

[41] The defendant blamed the plaintiff for the delay in getting the replacement RHIB from Zodiac when the RHIB broke during the air drop test done by ATI in Florida. This is unjustified considering that the plaintiff did not advise that the air drop test be done in Florida. Due to the defendant's own decision, acting on the advice of ATI and not the plaintiff, in sending the RHIB to Florida for the test, which resulted in the accident and the boat breaking, the plaintiff cannot be made liable for additional costs incurred. There was a delay of 199 days for the RHIB to be delivered to RMAF Bukit Jugra since Zodiac took another five months to build and supply the replacement RHIB.

[42] From Byron's email dated 15 November 2013 to PW3 (exh P4A in IDTP p 5), Byron informed the defendant that the initial study shows that the catastrophic malfunction during the air drop trial was not due to the RHIB or BADSS, but caused by 'human error'. Byron informed PW3/the defendant that this information is confidential and the plaintiff would not be notified. Thus it is not true, as contended by the defendant, that the RHIB broke because the plaintiff supplied a boat without a tie-down point and that caused the accident. The issue raised by the defendant about the lack of a tie-down point is an afterthought. In any case, other than the oral evidence of DW1, there is no documentary proof of this allegation by the defendant.

[43] PW3, who was at the material time employed by the defendant and handling the matter, testified in court that the RHIB broke in Florida due to the negligence of ATI during the process of the PDI.

[44] From the start, the defendant had made it clear to the plaintiff that the plaintiff was to be responsible for the RHIB only, whilst the defendant would be responsible for the BADSS. PW1 stated that the defendant's offer to him was:

(a) the plaintiff would not be allowed to bid in the tender by Mindef;

(b) the defendant would pay the plaintiff 8% commission based on the contract value of RM5,400,000 for the Mindef Contract ie RM432,000; and

(c) PW1's company, ie the plaintiff, would only manage matters regarding the RHIB and boat training, whereas air drop would be managed by ATI.

[45] The court finds that even the defendant itself had confirmed to the plaintiff that the plaintiff's scope was only to manage the RHIB and matters

connected to the boat including training. The plaintiff was not responsible for the air drop test. This can be seen in Abd Rasid Hassan's email (he is the defendant's employee) dated 14 November 2011 (IDB Pt B p 30):

> Saya diarahkan oleh pihak pengurusan syarikat untuk menyatakan seperti berikut:
>
> (1) Skop Tuan dan SSSB hanyalah mengendalikan boat dan perkara-perkara yang berkaitan dengan boat termasuk training; manakala perkara-perkara yang berkaitan dengan air drop dikendalikan oleh Airlift Technologies International;

[46] Thus, the plaintiff should not be made responsible for the air drop test in Malaysia, or for the loss of equipment of the RHIB during the air drop test.

[47] As for training, the plaintiff had included the training syllabus to the tender documents which were later included in annex (i) to Schedule No 1 to the Mindef Contract (IDB Pt B pp 97–101).

[48] PW1 stated that the plaintiff was to provide the following training:

(a) training after the installation and maintenance process; and

(b) training on management of the boat.

[49] PW1 said that the training in (a) above had been completed and the defendant was satisfied. However, there is no documentary evidence to prove this. As for the training in (b) above, PW1 stated that he had given the training information and syllabus (exh P2 in IDB Pt C pp 280–282) to the defendant. However, after the Mindef Contract was executed, the defendant rejected PW1's offer for training on the ground that they did not want a local trainer. PW1 believed that this was not discussed from the beginning of the contract. Finally, the defendant appointed Gerry, the Zodiac Canada consultant, to conduct the training.

[50] From the email of Dato' Azri bin Murad ('DW1'), the managing director of the defendant, dated 19 August 2009 (IDB Pt B p 45) to PW1, it is clear that DW1 was dissatisfied that PW1 was not suitable as a trainer:

> 3 As of now, here are some problems that we have:
>
> (a) RMAF does not want you to conduct the training. Some RMAF Officers alleged that you have no expertise to conduct the training.
>
> (b) Zodiac Paris, confirmed that you are not authorised to conduct training and sign on the training certificate on their behalf, which is compulsory to be issued as per the RMAF requirement.
>
> The development apparently changes a lot of things and increase our costs because you have represented to us that you are authorized by Zodiac Paris to conduct the

training and that RMAF has no problem with that. Now it looks like we have to get somebody from Zodiac and ATI to come here to conduct training. Mind you, the cost accordingly will have to be borne by somebody.

[51] Since PW1 was not authorised by Zodiac Paris to conduct training and sign on the training certificate, it is clear that the plaintiff was not able to conduct the training as required under the Mindef Contract. Under Schedule No 1 to the Mindef Contract (IDB Pt B p 96), 'Training' as per annex i is RM315,000 out of the total contract price of RM5,400,000. The plaintiff should not be allowed to claim 8% commission of the RM315,000.

[52] The total contract price of RM5,400,000 less RM315,000 is RM5,085,000.

8% of RM5,085,000 = RM406,800.

[53] The court does not agree with the submission of counsel for the defendant that this an entire contract and not a divisible contract, which means there must be complete performance by the plaintiff as a condition precedent before the defendant is liable to pay the plaintiff (see *Chitty on Contracts*, (23rd Ed) Vol 1 para 1147, *Halsbury's Laws of England*, (4th Ed) Vol 4 para 1145 and *Hoenig v Isaacs* [1952] 2 All ER 176). From the first agreement, it can be seen that the defendant's liability to pay the plaintiff the 8% commission arises once they 'manage to secure and perform the above Tender/Contract successfully'. The plaintiff was able to lobby for and assist the defendant to secure and perform the Mindef Contract successfully when the RHIB was delivered to RMAF Bukit Jugra. That part of the contract was performed in its entirety.

[54] However, the training part of the contract is divisible from the contract to supply the RHIB. The plaintiff gave some training after the installation and maintenance process. The defendant did not allow the plaintiff to give training on the management of the RHIB since the plaintiff was not acceptable as a trainer to the RMAF and the defendant. Therefore, the defendant can only be made liable to the plaintiff regarding the supply of the RHIB, but not for the training.

DECISION

[55] Based on the above considerations, on a balance of probabilities, the court is satisfied that the plaintiff and defendant had proved their respective claim or counterclaim as follows, and accordingly the court orders:

(a) regarding the plaintiff's claim in the statement of claim:

(i)(A) the plaintiff's claim for RM50,000 (out of the

RM382,000 claimed) being the balance of the consultant's fee of RM150,000 is dismissed; and

(B) payment of RM306,800 (ie RM406,800 less RM100,000 which was already paid by the defendant to the plaintiff) as on 6 September 2012 is allowed;

(ii) interest at 5%pa from the date of filing of the writ of summons until full settlement is allowed; and

(iii) costs of RM15,000.

(b) regarding the defendant's counterclaim

(i) the defendant's counterclaim is dismissed, except for the sum of RM54,000 for foreign expert training which is allowed;

(ii) interest at 5%pa on this sum from the date of filing of the writ of summons until full payment; and

(iii) costs of RM15,000.

Claim allowed and counterclaim dismissed in part.

Reported by Afiq Mohamad Noor